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No. 694

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1965

WARREN W. PERRY,
Appellant,

vs.

COMMERCE LOAN COMPANY,
Appellee.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF WITH APPENDICES FOR APPELLEE

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OPINIONS AND JUDGMENTS BELOW

The opinion and Order of the Referee, and the Opinion and Order of the United States Court are not reported, but may be found as Appendices to this Brief. The Opinion and Judgment of the United States Court of Appeals for the Sixth Circuit are reported in 340 F.(2d) 588, and are appended hereto.

JURISDICTION

Opinion and Judgment of the United States Court of Appeals for the Sixth Circuit, which the Appellant herein seeks to have this Court review, is dated January 25, 1965, and may be found in the Record at Pages 19-21. Petition for Writ of Certiorari on behalf of Appellant was filed October 25, 1965. (R. 23).

Jurisdiction to review the Judgment of the United States Court of Appeals is conferred on this Court by provisions of Title 28, U. S. Code, Section 1254 (1).

QUESTIONS PRESENTED

The question presented is whether a Discharge in Bankruptcy received within six years prior to a proceeding for relief under Chapter XIII of Bankruptcy Act constitutes a bar to confirmation of a Wage Earner Plan.

All three Courts from which this Petition is here presented on Appeal for Writ of Certiorari, have held that the Debtor was guilty of certain acts or failed to perform certain duties which would be a bar to his Discharge in Bankruptcy. 11 U.S.C., Sec. 1056 (3). Said Courts further held that by the language of 11 U.S.C. Sec. 32 (C) (5), providing that a Discharge within six years operates as a bar to a Discharge of the Bankrupt, prevented the Courts from confirming the Plan in the instant case.

The initial proceeding was commenced on August 8, 1963. The issue is complicated by the fact that the United States Court of Appeals for the Tenth and Third Circuits have reached opposite conclusions on the matter of Law presented. The Sixth Circuit has now held with the Third Circuit on this question.

PROPOSITIONS AND AUTHORITIES

The relevant statutory provisions of Chapter XIII are as follows:

> "Sec. 602. The provisions of Chapters 1 to 7 inclusive, of this title shall, insofar as they are not inconsistent or in conflict with the provisions of this chapter apply in Proceedings under this chapter . . ." (U.S.C.A. Sec. 1002)
>
> "Sec. 636. Where not inconsistent with the provisions of this chapter, all the rights, privileges, and duties of the debtor shall be the same . . . as if a voluntary petition for adjudication in bankruptcy had been filed and a decree of adjudication had been entered at the time the petition under this chapter was filed." (11 U.S.C.A. Sec. 1036)
>
> "Sec. 656(a). The court shall confirm the plan if satisfied that—
>
> * * *
>
> (3) The debtor has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to the discharge of the bankrupt . . ." (11 U.S.C.A. Sec. 1056)

By the provisions of Chapter III, Sec. 14c of the Act, a discharge is denied if the bankrupt has committed any of the offenses or failed to perform any of the duties specified in its seven numbered clauses, including clause (5) which is as follows:

> "Sec. 14c. The court shall grant the discharge unless satisfied that the bankrupt has . . . (5) in a proceeding under this title commenced within six years prior to the date of the filing of the petition in bankruptcy been granted a discharge, or had a composition or a wage earner's plan by way of composition confirmed under this Act . . ." (11 U.S.C.A. Sec. 32, sub. c.)

We respectfully invite this Court's attention and consideration to the following cases, viz:

In re: Schlageter, 3rd Cir., 319 F.2d 821 (1963);
In re: Goldberg, 6th Cir., 53 F.2d 454 (1931), and
In re: Helen Christine Nicholson, Debtor, U. S. Dis. Court, D. Oregon, (Oct. 25, 1963) Fed. Supp. 224, p. 773.

The *Schlageter* case, cited above, holds that a Discharge in Bankruptcy, not more than six years earlier, is a bar to the confirmation of a Wage Earner's Plan. The opinion is largely directed to the Debtor's argument that since his plan only contemplated an extension, and all debts would eventually be paid in full, the six year limitation would be inappropriate. The Court reasoned that no Wage Earner's Plan can be characterized as a simple extension, because by operation of Sec. 661 (11 U.S.C.A. 1061), the Debtor may be discharged at the end of three years, if his failure to pay all his debts is due to circumstances beyond his control.

In the *Goldberg* case cited, *supra,* the question there was whether a composition of Chapter 11 of the Act could be confirmed when the Debtor had had an earlier composition within six years. The applicable provision was in the same words as the one in the case at bar, a section which bars confirmation if the debtor is "guilty" of an act which would be a bar to a Discharge in Bankruptcy. The court never questions whether the six year limitation is comprehended by this expression and the opinion is taken up entirely with the matter of whether a prior composition has the same effect as a prior Discharge in Bankruptcy.

In the *Nicholson* case cited, *supra,* the two secured creditors and all of the unsecured creditors who had filed claims, accepted the plan, and consequently, no objection

whatsoever was offered by any of the creditors, notwithstanding the fact that they had full knowledge of the prior bankruptcy, and a discharge in connection therewith within the six year period prior to the commencement of the debtor petition under Chapter XIII. The Referee, nevertheless, entered an Order denying confirmation and dismissed the proceeding on the ground that petitioner had been granted a Discharge in Bankruptcy within six years next preceding the filing of Chapter XIII Petition. An appeal was prosecuted to District Judge Kilkenny with the result that the Referee's decision was affirmed. Judge Kilkenny discusses at great length in his opinion the applicable principles of law, and we respectfully invite this Court's attention to same.

A most recent Decision handed down by the United States District Court may be found in Fed. Supp. 227, Page 973. *In the matter of John E. Fontan, Debtor,* Case No. 2303-B, Southern District of Mississippi. This Decision takes the same position on the proposition involved as Authorities heretofore cited by the Appellee herein.

ARGUMENT

Until the intervention of this Decision by the Referee and the succeeding Affirming Courts designated herein, it was frequent practice for Debtors in straight bankruptcy actions to seek discharge from their obligations and within a period of two to six months thereafter incur other indebtedness and then file a Petition under Chapter XIII, thereby seeking to relieve and release themselves from their newly found liabilities. Such persons became known, in Lawyer's parlance as "repeaters," who apparently were not seeking the honest protection of the Law but to defraud their creditors, whenever and wherever the opportunity

arose. We concur in the expressed Opinion of the learned Judge, Mac Swinford, in a bankruptcy case on record in the United States Court, Eastern District of Kentucky, at Covington, known and designated as the *Edward Louis Ott* matter, in which Judge Swinford said:

> "Bankruptcy is essentially an equitable proceeding, and there is no place in our system of jurisprudence where open and above board dealings are more essential. The Law is willing to relieve an oppressed debtor of his debts where he, himself, has come into Court with clean hands."

RELIEF

It is respectfully urged that the conclusion to be reached herein is supported by provisions of Section 606 of the Act, to the effect that the rights, privileges and duties of the Debtor, under Chapter XIII Proceedings, are the same as those of a Bankrupt. It would appear to follow that a right to a discharge is a prerequisite to the right to have a Wage Earner Plan confirmed. Accordingly, if the Debtor, under Chapter XIII was in no position to receive a Discharge by reason of having received the same within a period of six years previous to the Chapter XIII Proceedings, that his Application for Confirmation of Plan and his Petition in connection therewith should be, upon Motion duly made, as was done in this case, dismissed.

It is respectfully submitted and urged to this Court that the Rulings made by the numerous Courts herein cited embody the correct theory of the Law; and, for the reasons as cited in this Brief, we respectfully pray that the Con-

clusions, Decisions and Judgments heretofore reached by said Courts be Affirmed; that the Review thereof be denied, and this Appeal dismissed; and for all proper relief to which the Appellee herein may be entitled in the premises.

Respectfully submitted,

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APPENDIX "A"

OPINION AND ORDER OF HON. JOE LEE, REFEREE

This matter is pending upon the application of the debtor for confirmation of his wage earner plan under Chapter XIII of the Bankruptcy Act, and upon the countermotion of Commerce Loan Company of Covington, a creditor, to dismiss the debtor's petition. Dismissal is sought on the ground the debtor obtained a discharge in bankruptcy in a proceeding in this court commenced within six years prior to the date of the filing of the petition under Chapter XIII. The records of this court reveal the debtor filed a petition in straight bankruptcy on May 20, 1959, case No. 1679, and obtained a discharge in bankruptcy therein on June 29, 1959. The present proceeding was filed August 8, 1963.

The question presented is whether relief under Chapter XIII for a wage earner plan is barred by the fact the debtor has been granted a discharge in bankruptcy in a proceeding filed within six years next preceding the filing of the petition under Chapter XIII.

The issue is complicated by the fact the United States Courts of Appeal for the Tenth and Third Circuits have reached opposite conclusions on the matter. See Edins vs. Helzberg's Diamond Shops, Inc., C.A. 10, 315 F. 2d 223, decided April 5, 1963, holding a debtor is entitled to relief by means of a wage earner plan under Chapter XIII under such circumstances, and In re Schlageter, C.A. 3, 319 F. 2d 821, decided July 5, 1963, holding he is not.

The relevant statutory provisions of Chapter XIII are as follows:

> "Sec. 602. The provisions of chapters 1 to 7, inclusive, of this title shall, insofar as they are not in-

consistent or in conflict with the provisions of this chapter, apply in proceedings under this chapter . . ." (11 U.S.C.A. Sec. 1002)

"Sec. 636. Where not inconsistent with the provisions of this chapter, all the rights, privileges and duties of the debtor shall be the same . . . as if a voluntary petition for adjudication in bankruptcy had been filed and a decree of adjudication had been entered at the time the petition under this chapter was filed." (11 U.S.C.A. Sec. 1036)

Sec. 656(a). The court shall confirm the plan if satisfied that—

* * *

(3) The debtor has not been *guilty* of any of the acts or failed to perform any of the duties which would be a bar to the discharge of the bankrupt . . ." (11 U.S.C.A. Sec. 1056) (Italics added).

By the provisions of Chapter III, Sec. 14c of the Act, a discharge is denied if the bankrupt has committed any of the offenses or failed to perform any of the duties specified in its seven numbered clauses, including clause (5) which is as follows:

"Sec. 14c. The court shall grant the discharge unless satisfied that the bankrupt has . . . (5) in a proceeding under this title commenced within six years prior to the date of the filing of the petition in bankruptcy been granted a discharge, or had a composition or an arrangement by way of composition or a wage earner's plan by way of composition confirmed under this Act . . ." (11 U.S.C.A. Sec. 32, sub. c.)

A provision similar to Section 656(a) (3), supra, appears in Chapter XI, Sec. 366(3) of the Act. The United States Court of Appeals for the Sixth Circuit had occasion to construe this latter provision in the case of In re Goldberg,

53 F. 2d 454, 80 A.L.R. 399. A careful reading of that opinion convinces the court that, while there was disagreement on other grounds, both the majority and minority opinions are in accord on the proposition that all the prohibitive clauses of Sec. 14c are incorporated by reference in Sec. 366(3). In the majority opinion the court said at page 455:

> ". . . The applicable portion thereof is section 12d (11 U.S.C.A. Sec. 30(d), to-wit: that 'the judge shall confirm a composition if satisfied that (1) it is for the best interests of the creditors; (2) the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge; and (3) the offer and its acceptance are in good faith.' This paragraph originated with the Act, and Congress has never disturbed it. It is not difficult to determine what 'acts' and 'duties' were referred to in clause (2). They are those acts and duties found in clauses (1) and (2) of section 14b of the original Act. Section 14b has been amended from time to time until it now stands as printed in the margin. By its provisions, a discharge is denied if the bankrupt has committed any of the offenses or failed to perform any of the duties specified in its numbered clauses. See Bluthenthal v. Jones, 208 U.S. 64, 65, 28 S. Ct. 192, 52 L. ed 390; In re Jacobs, 241 F. 260, 624 (C.C.A. 6). *Section 12d(2) denies the composition upon the same grounds; that is, if the bankrupt has been guilty of any of the acts or failed to perform any of the duties specified in section 14b, as it now stands,* which would be a bar to his discharge. If appellant is denied confirmation of the composition he has made with his creditors, it can only be because he is guilty of the offense of applying for such an order within six years after he 'has been granted a discharge in bankruptcy.' See clause (5) of Section 14b . . ." (Italics supplied).

While there is other language in the majority opinion which might be interpreted as modifying the postulate that Sec. 12d(2), now Sec. 366(3) incorporates by reference all of Sec. 14b, now Sec. 14c, as implied in the above-quoted language, it would appear the court was simply emphasizing that the appellant could not be deemed guilty of committing the offense of having been granted a discharge in bankruptcy since it was not clear Congress intended the confirmation of a composition to be the equivalent of a discharge in bankruptcy. By subsequent amendment of the Act, Congress has made it clear that confirmation of a composition and a discharge in bankruptcy are equivalent. Act of 1938; Collier on Bankruptcy, 14th Ed., Vol. 1, Sec. 14.01, page 1252. But the hypothesis that Sec. 366(3) incorporates by reference all of Sec. 14c remains sound.

The various debtor relief chapters are in pari materia. Hellenbeck vs. Penn Mutual Life Insurance Co., Bankruptcy Law Reporter No. 221, Oct. 29, 1963, CCH 60,957. If Sec. 366(3) of Chapter XI incorporates by reference all of Sec. 14c of Chapter III, it follows that Sec. 356(a) of Chapter XIII does likewise, with the result that confirmation of a wage earner plan is precluded if the debtor has been granted a discharge in bankruptcy in a proceeding commencing within six years prior to the date of filing of the petition under Chapter XIII.

As stated by the court in Re Greenman, 10 F. Supp. 452, at page 453: "It seems to me more reasonable to believe that when Congress provided that the debtor's composition should be confirmed unless he had 'been guilty of any of the acts or failed to perfrom any of the duties which would be a ground for denying his discharge,' it was nothing but a rather slipshod way of saying that the debtor should

have his composition confirmed (and thus be discharged) unless he had by his own act placed himself in a position where he could not receive a discharge under Section 14 in any ordinary bankruptcy." Since the language of Sec. 366(3) and 356(3) are similar it would seem Congress intended that a wage earner plan either by way of composition or extension should not be confirmed unless the debtor is entitled to a discharge in bankruptcy.

There is authority for the view that Section 14c(5) is inconsistent or in conflict with the provisions of Chapter XIII and therefore inapplicable to wage earner proceedings. If this view is valid a prior discharge would not even bar a subsequent wage earner plan by way of composition. See In re Kornbluth, C.A. 2, 65 F. 2d 400, at page 403.

In In re Mahaley, 187 F. Supp. 229, (1960) and In re Sharp, 205 F. Supp. 786 (1962), it was concluded that the *purposes* underlying Sec. 14, sub. c(5) of the Bankruptcy Act are so inconsistent with the *purposes* underlying relief by way of extension under Chapter XIII as to make said section inapplicable in Chapter XIII proceedings. The word *purposes* is underlined to emphasize there was no finding of inconsistency or conflict in specific language. It is worth noting that Sec. 602 of the Act provides that Chapters 1 to 7 shall apply insofar as they are not inconsistent or in conflict with the *provisions* of Chapter XIII. This would seem to require a finding of inconsistency or conflict in rather specific provisions rather than in purposes.

The conclusion herein is buttressed by the provision in Section 606 of the Act, not referred to in the *Mahaley* or *Sharp* cases, to the effect that the rights, privileges and duties of the debtor are the same as those of a bankrupt. It would seem therefore that a right to a discharge is a prerequisite to the right to have a wage earner plan confirmed.

Accordingly, the debtor's application for confirmation of his plan should be, and hereby is, denied, and the motion of Commerce Loan Company to dismiss the petition should be, and hereby is, sustained.

IT IS ORDERED that copies of this Opinion and Order be served by mail upon the parties shown below.

At Lexington, Kentucky, this December 2, 1963.

/s/ JOE LEE
Referee in Bankruptcy

APPENDIX "B"

MEMORANDUM (OPINION) OF HON. MAC SWINFORD, JUDGE

The wage earner has filed a Petition for Review of an Order of the Referee denying his application for confirmation of his wage earner plan and dismissing his petition. The Referee wrote an Opinion in connection with the Order complained of justifying his action in denying confirmation on the ground that the Debtor obtained a Discharge in Bankruptcy in this Court on June 29, 1959. The present proceeding was commenced on August 8, 1963.

The question of whether the six-year limitation on successive proceedings under the Bankruptcy Act is applicable to wage earners' plans is by no means settled by the judicial authorities, nor is it expressly resolved by the language of the Act. This judge is of the view, however, that the Opinion of the Referee is correct and that it should be affirmed.

Section 656 of the Act (11 U.S.C. 1056) provides that the court shall confirm a wage earner's plan if, among other conditions, the debtor has not been guilty of any act which would be a bar to the discharge of a bankrupt. A discharge

within six years prior is, of course, a bar to a discharge in bankruptcy. 11 U.S.C. 32(c) (5). A number of cases, represented by *In re Holmes,* 10th Cir., 309 F. 2d 748 (1962), have been decided on the view that a wage earner's plan in the nature of an extension should not be barred by a prior discharge because it is so different in purpose from the relief afforded by straight bankruptcy. This reasoning is open to the criticism, however, that there should be no accounting for the purpose of legislation except to resolve ambiguity in the language used therein.

The use of the word "guilty" in section 656(a) (4) in referring to the conduct which bars confirmation of a wage earner's plan may perhaps lead to the thought that only conduct which is inherently reprehensible is comprehended by the provision. The appearance of this word here is accidental. The language of the section is a carryover from the corresponding provision in Chapter 11 relating to compositions. This chapter was enacted in 1874, a time when the bars to discharge embraced only offenses under the Bankruptcy Act punishable by imprisonment and the destruction or concealment of records. This would provide a suitable context for the word "guilty" and when prior discharge was added to these bars, the phraseology was not changed, possibly through negligent draftsmanship. See *In re Goldberg,* 6th Cir., 53 F. 2d 454 (1931).

The opinion in *In re Holmes, supra,* does not specify the reason for resorting to the general purpose of the legislation as an aid to construction. This decision along with those in *In re Sharp,* W.D. Mo., 205 F. Supp. 786 (1962) and *In re Mahaley,* S.D. Calif., 187 F. Supp. 229 (1960), does well to some extent on section 602 of the Act (11 U.S.C. 1002) which incorporates by reference into Chapter 13 as much of Chapters 1 to 7 as is not inconsistent with the provisions of Chapter 13. But this is only one possible

means of carrying the six-year limitation into the matter of confirming wage earners' plans and a general finding of inconsistency of purpose would seem to have no application beyond consideration of how this particular section should operate. The more immediate concern is with the effect of Section 656(a) (4) which states that no more nor less than that whatever is a bar to a discharge in bankruptcy is a bar to the confirmation of a wage earner's plan.

This judge is supported by the case of *In re Schlageter,* 3rd Cir., 319 F. 2d 831 (1963) which holds that a discharge in bankruptcy not more than six years earlier is a bar to the confirmation of a wage earner's plan. The opinion is largely directed to the debtor's argument that since his plan only contemplated an extension, and all debts would eventually be paid in full, the six-year limitation would be inappropriate. The Court reasoned that no wage earner's plan can be characterized as a simple extension because by operation of Section 661 (11 U.S.C. 1061), the debtor may be discharged at the end of three years if his failure to pay all his debts is due to circumstances beyond his control.

This Court is also bound by the reasoning of the Court of Appeals for the Sixth Circuit in *In re Goldberg, supra.* The question there was whether a composition under Chapter 11 of the Act could be confirmed when the debtor had had an earlier composition within six years. The applicable provision was in the same words as the one in the case at bar, a section which bars confirmation if the debtor is "guilty" of an act which would be a bar to a discharge in bankruptcy. The Court never questions whether the six-year limitation is comprehended by this expression and the opinion is taken up entirely with the matter of whether a prior composition has the same effect as a prior discharge in bankruptcy.

An Order is entered this day affirming the Opinion of the Referee and dismissing the Petition for Review.

/s/ MAC SWINFORD
Judge

January 20, 1964

APPENDIX "C"

OPINION AND JUDGMENT OF THE SIXTH CIRCUIT COURT OF APPEALS

No. 15809

(Decided January 25, 1965.)

Before WEICK, Chief Judge, CECIL, Circuit Judge, and KENT, District Judge.*

PER CURIAM. Perry, the debtor, filed in the District Court a Wage Earner Plan under Chapter XIII of the Bankruptcy Act, 11 U.S.C. §§ 1001-1086. His petition revealed, however, that he had previously filed a petition in bankruptcy within six years of filing the Wage Earner Plan and had been granted a discharge. The referee, for that reason, denied his application for confirmation of the plan and upon motion of a creditor dismissed the petition. This ruling was affirmed by the District Judge upon review of the referee's order.

The only question before us is whether the previous bankruptcy within six years barred confirmation of the plan and warranted dismissal of the case.

In order to confirm the plan, the court must be satisfied among other things, that "the debtor has not been guilty of any of the acts or failed to perfrom any of the duties

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* Sitting by designation from the U. S. District Court Western District of Michigan.

which would be a bar to the discharge of a bankrupt." 11 U.S.C. § 1056 (3).

A discharge within six years operates as a bar to the discharge of a bankrupt. 11 U.S.C. § 32(c) (5).

The plain language of the Act prevented the court from confirming the plan in the present case. The fact that a Wage Earner Plan seeking an extension of time to pay the indebtedness was involved, instead of another ordinary bankruptcy case, was immaterial. The statutory bar existed in either case.

If proceedings of this type are to be exempted from the provisions of Section 32(c) (5), such exemption should be made by Congress and not by the courts. The National Bankruptcy Conference has proposed amendments to the Act which would permit the filing of such proceedings wtihin six years. See Proceedings of Nat'l Bankruptcy Conf. 1961 Ann. Meeting, Res. No. 2, and Proceedings of Nat'l Bankruptcy Conf. Ann. Meeting of October 25-26, 1962.

Our views are supported by *In the Matter of Schlageter,* 319 F. 2d 821 (C.A. 3, 1963); *In re Jensen,* 200 F.2d 58 (C.A. 7, 1952); *In the Matter of Fontan,* 227 F.Supp. 973 (S.D. Miss. 1964); *In the Matter of Nicholson,* 224 F.Supp. 773 (D. Ore. 1963); *In the Matter of Bingham,* 190 F. Supp. 219 (D. Kan. 1960), *aff'd.* 297 F.2d 341.

There are other decisions, which we do not follow, that have reached a contrary result. *Edins* v. *Helzberg's Diamond Shops, Inc.,* 315 F.2d 223 (C.A. 10, 1963); *In re Sharp,* 205 F.Supp. 786 (W.D. Mo. 1962); *In the Matter of Mahaley,* 187 F.Supp. 229 (S.D. Cal. 1960); *In the Matter of Verlin,* 148 F.Supp. 660 (E.D. N.Y. 1957), *aff'd* 255 F.2d 682 (C.A. 2, 1958). In our opinion the statute is not susceptible to the construction given it in these cases.

Affirmed.